A. W. Schlesinger Geriatric Center *and* Service Employees International Union, Local 706, AFL–CIO. Cases 23–CA–10109, 23–CA–10129, 23–CA–10165, and 23–CA–10188

August 26, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On March 31, 1986, Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

On April 19, 1990, the National Labor Relations Board remanded this case to the judge with the instruction that he reopen the record for the sole purpose of obtaining from the Board's Regional Office, entering into evidence, and transmitting to the Board, a copy of the decertification petition filed in Case 23–RD–572 on August 1, 1985.[1] Pursuant to this remand, on July 9, 1990, the judge admitted into evidence seven pages of employees' signatures received from the Regional Office,[2] closed the record in the case, and transferred to the Board the seven signature pages.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions only to the extent consistent with this Decision and Order.

For the reasons set forth below, we agree with the judge's dismissal of complaint allegations that the Respondent violated Section 8(a)(5) of the Act by refusing to furnish the Union with requested information, by unilaterally abrogating the contractual grievance-arbitration procedure, and by suspending bargaining and withdrawing recognition from the Union. In light of our finding that the Respondent lawfully withdrew recognition from the Union on August 2, 1985,[5] we also adopt the judge's dismissal of complaint allegations that the Respondent violated Section 8(a)(5) by refusing to allow a union representative to enter the Respondent's facility on August 6, and by unilaterally reducing unit employees' wages in October 1985.

Further, we adopt the judge's finding that the employees' July 1 to September 3 strike was an economic strike for its duration, and his finding that the Respondent did not unlawfully refuse to reinstate striking employees immediately on their unconditional offer to return to work. We reverse the judge, however, and find that the Respondent violated Section 8(a)(3) by treating employee Logie Rideaux as a striker and failing to reinstate her when she was ready to return to work from disability leave.

The Respondent and the Union were parties to a collective-bargaining agreement which was effective from June 17, 1984, to June 30, 1985, and covered a unit of service and maintenance employees at the Respondent's nursing home. On May 24, 1985, the parties began negotiations for a new contract. They engaged in 14 bargaining sessions between May 24 and July 18, but failed to reach an agreement. On June 28, the Union's membership authorized a strike which began on July 1 and ended on September 3. Also on June 28, the Respondent's attorney sent a mailgram to the Union's business agent stating that the Respondent would no longer be obligated to arbitrate grievances once the contract had expired, but that it would arbitrate all grievances presented to the Respondent before the expiration of the contract. Two unit employees filed a decertification petition on August 1. On August 2, the Respondent suspended bargaining and withdrew recognition from the Union. When the strike ended on September 3, the Respondent established a preferential hiring list of the striking employees and began to rehire them as vacancies occurred.

1. The complaint alleges that the Respondent violated Section 8(a)(5) by refusing to provide the Union with requested information concerning the wages of nonunit employees during four collective-bargaining meetings in June 1985. The complaint also alleges the Respondent unlawfully refused to provide information requested by the Union in writing in July, August, September, and October. These written requests sought information regarding employees hired for unit jobs during the strike, terms and conditions of employment of all unit employees, and copies of all disciplinary actions since July 1. The written requests also covered group health plan description and costs, and wage and benefit changes for nonunit personnel.

[1] An unpublished Order not included in bound volumes of Board decisions. On June 7, 1990, the Board denied the Respondent's motion for reconsideration of order remanding.

[2] The General Counsel's response to the judge's order on remand averred that these seven pages of signatures constituted the showing of interest filed by the Petitioner in support of the petition in Case 23–RD–572. No petition was submitted to the judge by the Regional Office.

[3] The judge also submitted to the Board a copy of his order on remand, a copy of his order denying motion, admitting evidence, and closing record on remand, and a copy of the Respondent's objection to admission of documents, with covering letter.

[4] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the General Counsel asserts that the judge's failure to discuss certain discredited evidence demonstrates bias or prejudice. See ALJD, sec. II, fn. 5. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

[5] All subsequent dates are in 1985, unless stated otherwise.

Early in the negotiations, the Respondent's attorney and chief negotiator, John Durkay, stated that the Respondent believed that the unit's wage scale was above area standards, and therefore the Respondent wanted the Union to agree to a reduction in wages. Durkay consistently maintained, however, that the Respondent was not claiming an inability to pay the current contract wages. Faced with this wage concession demand, the Union's chief negotiator, Richard Hall, asked Durkay during the June 18 bargaining session whether nonbargaining unit employees were going to have their wages cut.[6] Hall told Durkay that the Union did not think that only unit employees should be asked to take cuts in wages and benefits. Durkay responded that at that time the Respondent had not yet made a decision regarding the fringe benefits of nonunit employees, and that no changes in nonunit wages or benefits had been made. Durkay added that, in any event, the matter of nonunit employees' wages and benefits was not a relevant topic for bargaining and none of the Union's business.

Hall asked again at the June 20 meeting whether only the bargaining unit employees were being cut, and were any nonunit employees going to have their wages and benefits reduced. Hall told Durkay that the issue of ''fairness'' was very important to the unit employees, and that they needed to know if the cuts would be widespread and whether other, nonunit employees would be asked to make a sacrifice. Hall asked Durkay why the management staff, nursing staff, and clerical staff were not being asked to share in the cuts. Durkay replied that some nonunit staff and management personnel were going to take a cut in hours. Durkay added that since January 1 the Respondent had eliminated a number of supervisory positions, and that senior staff had been reduced from 9 or 10 to about 5. Further, in response to the Union's questioning at the June 24 meeting, the Respondent confirmed that nurses had been told that they would not receive a pay cut. Finally, at the end of the bargaining meeting on June 26, Hall asked Durkay whether the Respondent wanted to provide information about what was going to be done with nonbargaining unit personnel, and asked if Durkay understood the relevance of that information. Hall testified that he did not receive a response from Durkay at that meeting.

The Union's first written request for wage and benefit information about nonunit employees was given to the Respondent at the bargaining session of July 18, the last session before the Respondent's suspension of bargaining and withdrawal of recognition. This written request also asked for detailed information concerning (1) employees hired since the beginning of the strike on July 1, (2) health plan costs, (3) monthly patient day averages, (4) profit-and-loss statements, and (5) statements of assets and liabilities. The record shows that it was the practice of the parties to respond to written information requests at the next bargaining session. As noted above, no bargaining sessions were held after July 18.

In finding that the Respondent did not unlawfully refuse to furnish wage and benefit information regarding nonunit employees during the June sessions, the judge found that the requested wage information constituted financial information and therefore was not relevant to any bargainable issues because the Respondent was not claiming an inability to pay wage increases, but rather was stating an unwillingness to do so. For the same reason, the judge found that the information sought by the Union's July 18 written request was not relevant to any then-existing bargainable issues, and therefore the Respondent's failure to respond to the request was not unlawful.

Although we agree that the Respondent did not unlawfully refuse to provide requested information, we do so for reasons different from those advanced by the judge. Our review of the record demonstrates that during the June meetings there were no requests by the Union for information regarding nonunit employees that created an obligation on the part of the Respondent to supply such information. The Union's questions and statements concerning how the nonunit employees would be treated did not constitute clear and definite requests for information sufficient to trigger a duty of disclosure on the part of the Respondent. The record shows that the Union's established practice in bargaining with the Respondent was to make information requests in writing. We conclude that the Union's purported oral ''information requests'' made during the four sessions in June were more in the nature of statements of the Union's bargaining position, and were not specific and precise enough to put the Respondent on adequate notice that it was being asked to provide certain information in order to further the course of the negotiations.[7] Thus, we agree with the judge's dismissal of the complaint allegations regarding the Union's queries about nonunit employees' wages and benefits during the June bargaining sessions.

The Union did make a written and specific information request on July 18. The portions of this request relating to newly hired replacement employees and health plan costs are presumptively relevant to bargaining. Given the parties' acknowledged practice of responding to information requests at the next bargaining

[6] At the beginning of the negotiations, the Respondent posted at the facility a memorandum to employees, dated June 3, stating that ''all office and supervisory personnel have had to accept reduced wages as of January 1, 1985.''

[7] Requests for information need not be in writing or expressed in any particular form to give rise to a duty to provide information. *LaGuardia Hospital*, 260 NLRB 1455 (1982). We find, however, that in the context of the bargaining at issue here, the Union's requests were not made in a manner that sufficiently put the Respondent on notice that a more detailed response was required.

session, however, the Respondent's obligation to provide the aforementioned information was rendered moot by the Respondent's lawful withdrawal of recognition on August 2, discussed below. The parties had no more bargaining sessions after the one held on July 18, when the written information request was given to the Respondent, and there is no contention that the Respondent should have complied with the request before August 2. Further, in light of the Respondent's lawful withdrawal of recognition on August 2, it had no duty to comply with any of the Union's information requests made after that date. Accordingly, we affirm the judge's dismissal of the complaint allegations pertaining to the Respondent's failure to supply requested information.[8]

2. In affirming the judge's finding that the Respondent did not violate Section 8(a)(5) of the Act by abrogating the grievance-arbitration clause in the expired collective-bargaining agreement, we do not rely on the judge's reasoning, but rather on our conclusion that the Respondent's conduct did not constitute a repudiation of the grievance-arbitration procedure.

The record shows that on June 29, 1985—the day before the parties' last collective-bargaining agreement expired—the Respondent sent a mailgram to the Union stating, inter alia, that the Respondent was no longer obligated to arbitrate grievances because the existence of a written collective-bargaining agreement is a prerequisite to the arbitrator's jurisdiction. The Respondent added, however, that it would agree to arbitrate all grievances presented to it prior to the expiration of the contract. Further, at a bargaining session earlier that day, the Respondent's attorney and chief negotiator told the Union's negotiators that the Respondent's position was that ''we still do have to handle the grievances through the grievance procedure and we may well arbitrate the grievances but we are not bound to do so, and all those that arose prior to the termination of the contract, we would be bound to arbitrate.''

The collective-bargaining agreement expired at midnight on the morning of July 1, 1985, and the employees began a strike at that time. No grievances were filed after the strike began.

Based on credited testimony of the Respondent's attorney, the judge found that it was the parties' ''intention and understanding'' that the ''no-strike clause and the arbitration clause were linked together, and that when one fell the other also fell.'' Accordingly, the judge concluded that the Respondent did not violate the Act by abrogating the grievance-arbitration clause in the expiring contract.

Contrary to the judge, we do not view the Respondent's statements to the Union when viewed together as constituting a refusal to process grievances to arbitration. Although the Respondent posited that it was not obligated to arbitrate grievances after the contract expired, the Respondent also stated that it would continue to arbitrate all grievances presented to it prior to the expiration of the contract and that it ''may well arbitrate the grievances'' arising thereafter. Under these circumstances, the Respondent's comments did not rise to the level of being a total repudiation of an obligation to arbitrate and did not violate Section 8(a)(5) and (1) of the Act. See *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987).

3. The judge found that the Respondent's withdrawal of recognition from the Union on August 2, 1985, was lawful because the Respondent had clear and convincing evidence of actual loss of majority status by the Union through the Respondent's knowledge that a majority of unit employees had signed petitions stating that they no longer desired to be represented by the Union. The judge also found that, even if the Respondent did not have sufficient evidence of the Union's actual loss of majority status, the Respondent had a reasonably grounded good-faith doubt concerning the Union's majority status in view of oral repudiations of the Union by a substantial number of employees, the crossing of a ''hostile'' picket line by large numbers of employees despite picket line misconduct, and the Respondent's knowledge of the ''decertification'' petitions mentioned above. For the reasons set forth below, we agree that the Respondent's withdrawal of recognition did not violate Section 8(a)(5) and (1).

The record shows that on August 1, 1985, employees Thibodeaux and Walker filed with the Board's Regional Office a decertification petition with 142 unit employees' signatures. Earlier that day, Thibodeaux told Supervisor Larkins about the petition and showed her the petition's six pages of signatures. Larkins photocopied 4 of the 6 sheets of the petition; these 4 pages contained 93 signatures. After Thibodeaux and Walker returned from the Board's Regional Office, they again informed Larkins that the petition contained 142 names, and told her that another petition of mostly night-shift employees with 25 to 30 signatures had been lost. On the evening of August 1, Larkins told Personnel Director Rogers about the petition and Rogers reported it to Executive Director Smith, who told Attorney Durkay about it. The next morning, August 2, Larkins, Rogers, Smith, and Durkay discussed the decertification petition, as well as the union sentiments of the unit employees who then were working for the Respondent, and determined that the Union no longer had majority support. At that morning's meeting of the negotiating teams, Durkay announced that because of the pending decertification petition he was suspending negotiations, and thereafter the meeting ended.

[8] In light of our disposition of this issue, we find it unnecessary to reach the issue of whether the information requested regarding nonunit employees' wages and benefits was relevant to bargainable issues.

On August 6, employee Walker obtained 42 more signatures on a second petition of night-shift employees. Walker showed this petition to Larkins, who photocopied it. This petition contained 11 duplicates of signatures on the first petition of 142 names. On the same date, Attorney Durkay wrote a letter to Union Official Hall which stated that the Respondent had a good-faith doubt regarding the unit employees' majority support for the Union, and therefore ''active collective bargaining'' would remain ''suspended.''

The judge concluded that based on the 167 to 172 signatures that Supervisor Larkins had seen or been told about (the 142 on the petition and the 25–30 on the alleged ''lost'' petition of night-shift employees), as of August 2, the Respondent had evidence of actual loss of majority status by the Union. Further, in light of the 31 new signatures on employee Walker's August 6 petition (the judge mistakenly stated 32), the judge found that as of August 6, Larkins had seen the signatures of 174 (actually 173) different employees on the decertification petitions by the time of Durkay's August 6 letter to the Union advising it that the Respondent was suspending bargaining based on a good-faith doubt of the Union's continued majority status. The judge concluded that all these circumstances demonstrated that the Respondent had clear and convincing evidence of the actual loss of majority status by the Union.

Nevertheless, the judge found that, even assuming there was insufficient evidence of the Union's actual loss of majority status, given the total circumstances of the case, the Respondent had a reasonably grounded good-faith doubt about the Union's continued majority status. In this regard, the judge relied on (1) detailed testimony by supervisors concerning oral repudiations of the Union by at least 84 employees; (2) the crossing of the ''hostile'' picket line by the replacement employees despite picket line misconduct and property damage by strikers; and (3) the Respondent's knowledge that a majority of the unit employees had signed the decertification petitions. Although we agree with the result reached by the judge, we do not agree with his entire analysis of the record evidence, as explained below.

The threshold determination that we must make concerns the size of the unit on August 2, when the Respondent withdrew recognition.[9] There is an unresolved dispute in this case concerning the number of employees in the unit during the first week of August. The judge admitted into evidence two lists offered by the Respondent which assertedly showed how many unit employees there were on August 2. One of these lists was labeled ''Employees Working 8/1/85'' and it contained 178 names. The other list, labeled ''Employees on Strike or Leave of Absence 8/1/85,'' contained 125 names. Thus, adding these 2 lists together, the Respondent argues that there were 303 employees on August 2.[10]

The General Counsel and the Union allege that there were 329 unit employees on August 2. They contend that there were 26 names of striking employees improperly omitted from the Respondent's list of employees on strike or on leave of absence, and that they must be counted in computing the size of the unit on August 2. In support of this contention, a list of these 26 names was offered by the Union and accepted into evidence by the judge. The Respondent contends that the individuals appearing on this list were not employed on August 2 because 20 had been discharged for picket line misconduct and 6 were voluntary quits before August 2. The judge did not make an exact finding on the size of the unit because he found that even assuming the General Counsel's 329 figure, the Respondent still had proof of actual loss of majority status because it knew that 167–172 employees had signed decertification petitions. The judge, however, appeared to conclude that the total number of unit employees on August 2 was 302, based on testimony concerning the number of employees in the prestrike unit and the number of new employees hired during the strike.[11]

After reviewing all the above evidence, we conclude that the unit had 329 employees as of August 2, when the Respondent withdrew recognition. Although the Respondent contends that 20 of the individuals appearing on the Union's list of additional employees had been discharged for picket line misconduct, none of these individuals had been so advised by the Respondent as of August 2, and there are no personnel records or any other documentary evidence to support the Respondent's contention. Further, there is no evidence, aside from Executive Director Smith's testimony, that the other six employees on the list resigned their employment prior to August 2. On the state of this record,

[9] We do not rely on the implication in the judge's decision that August 6 is a relevant date for determining whether the Respondent had a basis for believing that the Union had lost its majority status. Instead, the crucial date is August 2, when the Respondent ''suspended'' bargaining. The complaint alleges that August 2 was the date on which the Respondent withdrew recognition from the Union, and we agree. Accordingly, the second petition shown by Walker to Larkins on August 6 is immaterial to our resolution of this case.

[10] The Respondent's executive director, Emma Smith, testified on direct examination that on August 2 the Respondent employed an estimated 310–312 unit employees.

[11] Contrary to the General Counsel's contentions, we find that there is ample evidence establishing that the striker replacements were hired on a permanent basis. Thus, despite the statements of the Respondent's attorney to the Union's negotiators that the status of the strikers was subject to bargaining, the Respondent informed the Union on June 29, 1985, that effective on the following July 2, the Respondent would begin hiring permanent replacements to fill the strikers' positions. At the commencement of the strike on July 1, the Respondent began hiring replacements. Although it is not clear that all the employees hired beginning on July 1 were told at that time that they were being hired on a permanent basis, around the third week of July the Respondent initiated a series of meetings, in response to various concerns expressed by the replacements as to their status at the strike's conclusion, at which the Respondent told the replacements that they had been hired on a permanent basis.

we find that the Respondent has failed to prove that the additional 26 individuals in fact were discharged or quit their jobs, and therefore we shall count them as part of the unit on August 2.

The Respondent's withdrawal of recognition from the Union was lawful only if the Respondent is able to show that the Union actually lost majority support, or that the Respondent had a reasonably grounded good-faith doubt, based on objective factors, concerning the Union's continued majority status.[12]

We need not address the issue whether the Respondent proved actual loss of majority status because we find that the Respondent had objective grounds for a reasonable good-faith doubt of the Union's continued majority status. In order to satisfy its burden of proof in this regard, the Respondent offered as evidence the existence of the first decertification petition, statements by a significant number of employees allegedly repudiating the Union, and employees' crossing of the picket line and working during the strike. With respect to the petition, the judge credited testimony that the Respondent's agent, Supervisor Larkins, reviewed 6 pages with 142 employees' signatures repudiating the Union, and that these pages were filed with the Board's Regional Office as a decertification petition. As mentioned earlier, Larkins photocopied 4 of the 6 pages of this petition, and these 4 pages contained 93 signatures.

The four pages of the petition that Larkins had photocopied were accepted into evidence during the hearing before the judge, but the entire petition was never made part of the record. On the first day of the hearing, the Respondent caused to be issued on the Board agent to whom the petition had been delivered a subpoena duces tecum which called for the production of the decertification petition case file.[13] At the hearing, the judge granted the General Counsel's motion to quash the subpoena. In refusing to comply with the Respondent's subpoena, the General Counsel stated that ''generally, this agency does not disclose a petitioner's showing of interest in a representation case due to its need to preserve the confidentiality of this type of document.'' Thus, the record initially presented to the Board for review contained only 93 of the 142 names appearing on the August 1 petition.

The Board subsequently decided that in order to ascertain whether the Respondent established a good-faith doubt or a showing of actual loss of majority, it was necessary for the Board to review all 142 names on the 6 pages of the petition. Not only would this corroborate the testimony regarding the number of signatures on the petition, but it would also enable the Board to compare the names on the petition with the names of those employees who made antiunion statements to supervisors to ensure that an employee was only counted once for purposes of determining the number of unit employees who had rejected continued union representation. Accordingly, the Board, by Order dated April 19, 1990, reversed the judge's quashing of the Respondent's subpoena to the extent that it called for the production of the decertification petition filed on August 1, 1985, and remanded to the judge for a reopening of the record for the limited purpose of obtaining from the Board's Regional Office a copy of the petition and transmitting that petition to the Board.[14]

In response to the remand order, the General Counsel forwarded to the judge seven pages of employees' signatures, that the General Counsel identified as the showing of interest supporting the decertification petition. Two of these pages are the second petition containing 42 signatures obtained by employee Walker on August 6. These two pages already were admitted into evidence during the hearing, and in any event, are irrelevant to our determination here because they were obtained after the Respondent withdrew recognition from the Union. The General Counsel, however, forwarded to the judge only five of the six pages of employees' signatures submitted to the Regional Office as the showing of interest supporting the decertification petition. Four of these five pages already were part of the record, having been admitted into evidence during the hearing. The fifth page, which is the only new piece of evidence resulting from the Board's remand, contains 19 additional names. Thus, there are now 112 signatures of employees who signed the first decertification petition in evidence. The General Counsel has not explained the absence of the sixth page of employee signatures, and we must conclude that the remaining page is currently unavailable to the Regional Office.

We note that the General Counsel has never contended that the petition had less than 142 signatures of unit employees. Further, the credited testimony shows that, when the petition was filed by employees Thibodeaux and Walker on August 1, the Regional Office agent counted the names on the petition and acknowledged that the petition consisted of 6 pages with 142 signatures.[15] Because of the General Counsel's failure to forward the sixth page of signatures to the judge, there is a possibility that there may be some

[12] See, e.g., *Destileria Serralles*, 289 NLRB 51 (1988). Because we have found that the Respondent did not unlawfully refuse to provide information to the Union, this withdrawal of recognition was made in a context free of unfair labor practices.

[13] The decertification proceeding, Case 23–RD–572, had been ''administratively dismissed'' pending the outcome of the unfair labor practice charge that had been filed by the Union against the Respondent on July 19, 1985.

[14] In doing so, the Board found no merit to the General Counsel's position concerning preserving the confidentiality of the signers of the petition because Larkins had already seen the petition and therefore receipt of the petition into evidence would not disclose the identity of any signers which had not previously been disclosed to the Respondent.

[15] Although the General Counsel's exceptions argue that the judge's good-faith doubt finding was incorrect, the General Counsel has never questioned the existence of the petition nor argued that the petition had less than 142 names on it.

overlap between the individuals who signed that missing page and the individuals who made oral statements to supervisors repudiating the Union. We have decided, however, that this uncertainty must be resolved in the Respondent's favor because it has done all that is possible to include the entire petition in the record. In view of these circumstances, we find that the Respondent has satisfied its burden to show that its agent reviewed an employee petition with 142 names prior to its August 2 withdrawal of recognition, although we are able to examine only 112 of those names.

In addition to the signatures on the first decertification petition, the judge also relied on a number of statements made to supervisors by employees—both nonstrikers and replacement employees—as justifying the Respondent's good-faith belief of the Union's loss of majority support. In this regard, the credited testimony and a stipulation by the parties shows that 78 different employees, cited by name, made statements to 5 supervisors criticizing or disavowing the Union prior to the Respondent's withdrawal of recognition on August 2.[16] An examination of the pages of signatures in the record demonstrates that of these 78 employees, 33 signed the August 1 petition. Thus, for purposes of determining whether the Respondent had an objective basis for a good-faith doubt of the Union's continued majority status, the statements made by the 45 employees who had not signed the petition are material.[17] Of these 45 employees, we find that the statements of 40 demonstrate that they had repudiated the Union and no longer wished to be represented by it for collective-bargaining purposes.[18] The evidence concerning the statements of the remaining five employees is either too sketchy or questionable to constitute evidence of good-faith doubt because, although they may indicate disagreement with the strike or rejection of the Union's conduct, they do not necessarily manifest a desire not to be represented by the Union.[19] Accordingly, in light of the 142 names on the decertification petition that the Respondent had seen and the evidence showing that an additional 40 employees had expressly repudiated the Union prior to August 2, we find that the Respondent had objective reasons for a reasonable good-faith doubt of the Union's majority status, and therefore its August 2 withdrawal of recognition was lawful.[20]

4. The judge dismissed the complaint allegation that the Respondent unlawfully refused to reinstate employee Logie Rideaux on September 5, 1985. The judge found that the Respondent properly treated Rideaux as a striking employee and placed her on the preferential hiring list of striking employees. We disagree, and find that the Respondent violated Section 8(a)(3) by its treatment of Rideaux.

Rideaux was on disability leave from her position as a nurses aide beginning in mid-May 1985. In a telephone conversation on September 4, 1985 (the day after the strike ended), Rideaux told the Respondent's personnel director, Lillian Rogers, that her doctor had released her to return to work on the next day. Rogers told Rideaux that the Respondent believed that she had participated in the strike, and that she would be treated as any other striker. Rogers advised Rideaux that she could not come back to work at that time and that the Respondent would notify her when it was ready to take her back. Rideaux confirmed this conversation in a letter to Rogers dated September 5. Rideaux attached a copy of her doctor's release to this letter, and reiterated that she was ready to return to work. Nevertheless, the Respondent placed Rideaux's name on the preferential hiring list the day it received the doctor's release in the mail.

The Board has held that an employee who is unable to work during a strike because of an injury or disability cannot be considered a striker because he is unable to withhold his labor from his employer. *Brinkerhoff Signal Drilling Co*., 264 NLRB 348, 349 fn. 5 (1982). Rideaux was not released for work by her doctor until after the strike ended, and the Respondent has not shown that she was able to work before that time. Thus, Rideaux did not have the status of a striker, and the Respondent's treating her as a striker was erroneous.[21]

The record shows that the Respondent's practice is that an employee returning from disability status is put

[16] Most of these statements were made during the first 2 weeks in July, after commencement of the strike.

[17] Obviously, an employee who both signed the first petition and made an antiunion remark to a supervisor must be counted only once in ascertaining employee disaffection from the Union.

[18] These statements fall into one of three types: (1) the employee wanted no part of the Union; (2) the employee did not care to have a union or have the Union's business agent represent him or her; and (3) the employee did not need the Union to speak for him or her.

[19] Specifically, these are the statements attributed to employees Karen Judge, Shirley Walker, Wilma Barnett, Gloria Roundtree, and Ruby Lee Hill.

[20] In view of this conclusion, we find it unnecessary to address the evidence that employees, including striker replacements, crossed allegedly hostile picket lines in the face of threats, name-calling, and damage to property at the facility.

In this regard, the judge cited *Pennco, Inc*., 250 NLRB 716 (1980), enfd. 684 F.2d 340 (6th Cir. 1982), for the proposition that strike replacements are presumed to support an incumbent union in the same ratio as the employees they replaced. The judge found that the *Pennco* presumption had been rebutted here. We note that subsequent to the judge's decision, the Board in *Station KKHI*, 284 NLRB 1339 (1987), overruled *Pennco* and abandoned this presumption. In *Station KKHI*, the Board held that it will not apply any presumption concerning the union sentiments of strike replacements, but will review each case on its facts with respect to whether the employer has offered evidence of employees' expressed desires to repudiate the union sufficient to overcome the overall presumption of continuing union majority status. Applying *Station KKHI* to the facts of this case, we have found that the Respondent has shown sufficient objective considerations to support a good-faith belief that the Union lacked majority support.

[21] Rideaux's status as a nonstriker was not affected by the fact that she was seen on the picket line and, at the end of the strike when the Union tendered to the Respondent the unconditional offer to return to work on behalf of the strikers, Rideaux's name was included on the list of those for whom the Union was seeking reinstatement. The Union's inclusion of Rideaux in its blanket return-to-work offer does not satisfy the Respondent's burden to prove that Rideaux's disability status had ended before the cessation of the strike.

back in the position he held before his disability, but if that position is unavailable, he is asked to return to a similar position. Rogers testified that when Rideaux was cleared by her doctor to resume work, all nurses aide positions were filled, and there were no related positions available. This testimony, however, must be read in light of Rogers' belief that Rideaux was a striker, and Rogers' immediate placing of Rideaux's name on the preferential hiring list for returning strikers. Rogers testified that comparable positions were not considered for individuals on this list, nor was the possibility of a different shift offered to those on the list. Thus, no comparable position was considered for Rideaux, contrary to the Respondent's practice before the strike.

In addition, Rogers admitted that every time prior to September 1985 when an employee had been released by a doctor from disability leave, the employee was placed back in a job promptly after the release. The record also establishes that before Rideaux's situation, there had never been an occasion where there were no openings for someone coming off of workers' compensation disability. We conclude that Rideaux was treated differently than similarly situated employees had been treated in the past because the Respondent believed that she participated in the strike. Thus, the Respondent treated Rideaux disparately and deprived her of the job to which she was entitled under the Respondent's policy for reasons related to its perception that she had engaged in activity protected by Section 7 of the Act. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(3) by denying Rideaux immediate reinstatement.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to offer Logie Rideaux immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*.[22]

[22] 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, A. W. Schlesinger Geriatric Center, Beaumont, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Treating an employee who is ready to return to work after a disability leave in a disparate manner based on the Respondent's perception that the employee had engaged in activity protected by Section 7.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Logie Rideaux immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful treatment of Logie Rideaux and notify the employee in writing that this has been done and the unlawful action will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Beaumont, Texas facility copies of the attached notice marked ''Appendix.''[23] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found herein.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT treat an employee who is ready to return to work after a disability leave in a disparate manner based on our perception that the employee had engaged in activity protected by Section 7.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Logie Rideaux immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, with interest.

WE WILL notify her that we have removed from our files any reference to her unlawful treatment and that it will not be used against her in any way.

A. W. SCHLESINGER GERIATRIC CENTER

Robert G. Levy II, Esq., for the General Counsel.
John J. Durkay, Esq. and *James L. Weber, Esq. (Mehaffy, Weber, Keith & Gonsoulin)*, of Beaumont, Texas, and *T. J. Wray, Esq. (Fulbright & Jaworski)*, of Houston, Texas, for the Respondent Employer.
James E. Youngdahl, Esq. (Youngdahl, Youngdahl & Wright), of Little Rock, Arkansas, for the Charging Union.

DECISION

STATEMENT OF THE CASE

RUSSELL M. RING JR., Administrative Law Judge. These consolidated cases were heard by me in Port Arthur, Texas, on 20 through 23, and 25 through 26 November 1985.[1] The Initial charge was filed on 19 July by Service Employees International Union, Local 706, AFL–CIO (the Union).[2] An amended consolidated complaint was issued on 28 October by the Regional Director for Region 23 of the National Labor Relations Board (the Board) on behalf of the Board's General Counsel.[3] The complaint alleges that A. W. Schlesinger Geriatric Center (the Center), violated Section 8 (a)(l) and (5) of the National Labor Relations Act (the Act), by the following actions: (1) refusing to furnish the Union requested information relevant to the performance of the Union's function as exclusive bargaining representative of the Center's service and maintenance employees; (2) unilaterally abrogating the grievance-arbitration procedure as set out in the collective-bargaining agreement (the contract) between the Center and the Union; (3) through its supervisor and agent, Matilda Brown, soliciting employees to sign a petition to decertify the Union; (4) refusing the request of union representative Richard Hall for permission to enter the Center's facility, and thereby unilaterally changing a term and condition of employment established by the recently expired contracts; (5) refusing to meet at reasonable times for the purpose of bargaining with the Union since on or about 2 August; and (6) causing or prolonging a strike by certain employees that commenced on 1 July by the unfair labor practices alleged above. The complaint also alleges that the Center violated Section 8(a)(3) and (1) of the Act in discriminating in regard to the hire, tenure or terms and conditions of employment by refusing to reinstate immediately the employees engaged in the strike and employee Logie Rideaux on their unconditional offer to return to their former positions.[4] The Center, in its answer, denies that it violated the Act in any manner, and defends on the following grounds: (1) the Center alleges that it had no duty to furnish information concerning nonbargaining unit employees, and even if so, it in effect gave the requested information to the Union; (2) it did not refuse to accept or arbitrate grievances, but merely announced the position that the Center was not obligated to arbitrate grievances arising after the contract expired; (3) the Union neither objected to the Center's position nor requested use of the grievance-arbitration procedure; (4) the Center did not cause or prolong the strike by any unfair labor practices; (5) and due to a good-faith doubt that a majority of bargaining unit employees supported the Union, as of 2 August, the Center was privileged to refuse to bargain with the Union, to act unilaterally, to refuse to afford the Union access to its premises, and to refuse to furnish the Union information. The Center further contends that its agent, Matilda Brown, did not solicit employees to sign a decertification petition, and

[1] All dates are in 1985 unless stated otherwise.

[2] The Union also filed charges in Case 23–CA–10129 on 6 August, and in Cases 23–CA–10165 and 23–CA–10188 on 7 October.

[3] The term ''General Counsel,'' when used herein, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

[4] The pertinent parts of the Act (29 U.S.C. 151 et seq.) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . . .

Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . (5) to refuse to bargain collectively with the representative of employees. . . .

that the General Counsel's only witness concerning the allegation was not credible.

On the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel, counsel for the Union and counsel for the Center, I make the following

FINDINGS OF FACT[5]

I. JURISDICTION

The pleadings, admissions, and evidence in the case establish the following jurisdictional facts. The Center is now, and has been at all times material a nonprofit Texas corporation with its principal office and facility in Beaumont, Texas.[6] The center is engaged in providing medical, nursing and personal care for elderly and disabled persons. During the 12-month period immediately preceding the issuance of the final consolidated complaint, the Center, in the course and conduct of its business operations, derived gross revenues in excess of $100,000, and purchased and received at its Beaumont, Texas facility, products, goods and materials valued in excess of $5000 directly from points located outside the state of Texas. Thus, I find as alleged and admitted, that the Center is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Also as alleged and admitted, I find that the Union is, and has been at all times, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Brief Background*

The Center and the Union have been parties to successive contracts, the last of which by its terms was effective from 17 June 1984, to 30 June 1985. The unit represented by the Union was composed of the Center's service and maintenance employees. On 24 May, the parties began a series of negotiations for a new contract. Fourteen bargaining sessions were held between 14 May and 18 July without reaching an agreement on a new contract.

Early in the negotiations, the Center's bargaining representative, attorney John Durkay, made it known the Center believed that the unit's wage scale was above the area standard, and expected the Union to agree to a cut in wages. While the Center requested these wage concessions and Durkay indicated during bargaining that some staff and management employees were going to take a cut in hours, Durkay also maintained that the Center was not claiming an inability to pay the current contract wages. The Union's firm if not unshakable position was that it would not agree to a pay cut, and the Union's representative, Richard Hall, asked for wage information concerning nonbargaining unit employees to determine whether these employees' wages were also being reduced. The Union struck the Center 1 July. On 2 August, the Center withdrew from bargaining and in effect ceased to recognize the Union, claiming a good-faith doubt that the Union was supported by a majority of the unit's employees. On 3 September the strike ended and the striking employees offered to return to work. Although the Center thereafter established a preferential hiring list of the striking employees and commenced to rehire the striking employees as vacancies occurred, it continues to refuse to recognize and negotiate with the Union.

B. *Chronology of Significant Events*

The following constitutes a chronological list of the significant dates and events in the case, most of which are uncontested.

11 March: The Center's Executive Director Emma Jo Smith wrote to Hall, indicating the Center's desire to modify the contract and thereby terminating the contract on 30 June.

15 March: Hall wrote to Smith and requested the following four items ''in order to prepare for and conduct collective bargaining'': a medicaid cost report for 1984, Texas Department of Health Facility inspection reports for the past year, a utilization report on health insurance program for the past year, and copies of all job descriptions, work rules and benefit programs or procedures which had been amended or updated during the past year.

24 May through 18 July: 14 bargaining sessions were held or conducted by the Center and the Union.[7]

14 June: The Union notified the Center by letter, hand delivered, that it intended to strike on 1 July.[8]

24 June: During the bargaining session, Durkay offered to continue the current contract beyond its termination date and with the same wages, providing that the parties would continue to bargain and there was no strike.

24 through 30 June: The backs of geriatric chairs and two lounge chairs were discovered slashed.[9]

29 June: During a break in the bargaining session that day, an unlit Molotov cocktail was found near the main natural gas intake on the outside of the Center. Later, Durkay sent a mailgram to Hall indicating that the Center was ''no longer obligated to arbitrate grievances since the existence of a written collective-bargaining agreement is a prerequisite to the arbitor's jurisdiction,'' adding that the Center would agree to arbitrate all grievances presented to the Center prior to the expiration of the contract. The mailgram also informed the Union that effective July 2, 1985, the Center notifies the

[5] The facts found here are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

[6] The Center has approximately 400 beds. Press releases and other publications regarding the case indicate that it is the largest nursing home in Texas. Further, its size and nonprofit status make the Center somewhat unique.

[7] The Union was represented at these sessions by a bargaining team headed by the Union's business representative, Hall. The Center was represented by a bargaining team headed by attorney John Durkay. Virtually all of the bargaining conversations occurring at these sessions were between Hall and Durkay. These conversations were taken down in shorthand by an employee of the Center and were thereafter transcribed. These typed notes were all admitted into evidence in the case as a joint exhibit. The sessions were conducted on the following dates 24 and 31 May; 5, 6, 18, 19, 20, 24–26, and 29 June; and 10, 17, and 18 July. The strike commenced on 1 July.

[8] Approximately 5 days prior to the 14 June strike letter, the Union and the Center, by agreement, obtained the services of a federal mediator from the Federal Mediation and Conciliation Service, to participate in the bargaining.

[9] A geriatric chair is similar to a wheelchair with a high padded and covered back.

Union that it intends to hire permanent replacements for economic strikers without further notice.

30 June: During the evening, patients were administered excessive amounts of laxatives, resulting in loose stools the following morning. Also, drugs were mixed and patient medicine cards were found missing the following morning. At midnight, the contract expired.

1 July: Sometime after midnight the strike commenced and picket lines were established by the Union. The striking employees were virtually all replaced by new employees by the end of the first week of the strike.

5 July: The Texas State District Court of Jefferson County entered a temporary restraining order against the Union enjoining certain picket line misconduct and limiting the number of pickets at any given time.[10] Throughout the strike, which lasted some 2 months, there was considerable misconduct and violence on the part of some pickets. This picket line misconduct and violence will be discussed in some detail later in this Decision.

18 July: The two bargaining teams met for the last session where bargaining actually took place. Hall apparently hand delivered a letter dated 17 July to Durkay requesting certain and additional information, including information regarding newly hired replacements, health plan costs, monthly patient day averages for the previous year, monthly profit-and-loss statements for the same period, and a statement of current assets and liabilities of the Center. The letter further requested a summary of wage and benefit decreases or changes for nonbargaining unit personnel during the period 1 January through 18 July. Regarding this request, Hall stated in his letter that it was ''based upon [Durkay's] contention that a substantial decrease has been made for nonbargaining employees.'' This letter also was the first written request from the Union regarding information concerning the wages of nonbargaining unit employees.

19 July: The Union filed its first charge in the case alleging bad-faith bargaining on the part of the Center on and after 1 June, and also alleging that on or about 1 July the Center ''discriminated in terms and conditions of employment in order to discourage participation in and membership in and support of the [Union].''

25 July: Housekeeping aides and unit members Linda Walker and Margaret Thibodeaux commenced to obtain employee signatures on a union decertification petition. Walker had worked for the Center for 2-1/2 years and Thibodeaux for 16 years.[11] Walker testified she was not a union member. Thibodeaux was not asked about union membership.

1 August: Employees Walker and Thibodeaux traveled to Houston and filed the decertification petition with Region 23 of the Board.[12] Prior to their departure, LVN Supervisor Larkins found part of the petition unattended and copied these sheets of signatures. Thibodeaux and Walker informed Larkins prior to their departure to Houston that they were filing the petition and Larkins reported this to Executive Director Smith. After Thibodeaux and Walker returned from Houston, at their request they met again with Larkins whereupon they explained the number of names and signatures they had collected. Larkins gave this information to Personnel Director Lillian Rogers, who reported the information to Smith.

2 August: A bargaining session had been scheduled for 9:30 a.m. but prior thereto Durkay met with Smith and Rogers, and discussed the decertification petition filed the previous day. Also called in was Larkins and after discussing the decertification petition with Larkins, Durkay and Smith determined by calculation that a majority of the unit employees had signed the decertification petition.[13] At the 9:30 a.m. meeting of the negotiating teams, Durkay announced to the Federal mediator and to Hall that because of the pending decertification petition, he was suspending negotiations, and thereafter the session ended. Also Hall again on this date submitted another extensive written request for information to the Center, including information regarding nonunit employees.

5 August: Hall wrote to Durkay with an additional and extensive information request regarding the Center's finances, assets, liabilities, and again requested a summary of wage and benefit decreases or changes for nonbargaining unit personnel. Also in this letter Hall, on behalf of the striking employees, offered their return to work providing bargaining resumed ''in accord with the N.L.R.A. [the Act].''

6 August: Attorney Durkay wrote to Hall, partially in reply to Hall's 5 August letter, explaining that the Center had a ''good faith doubt'' regarding the unit employee's majority support for the Union, and thus ''active collective bargaining'' would remain ''suspended.''

3 September: As of 7 a.m., the strike ended and on behalf of the striking employees, the Union made an unconditional offer for their return to work.[14] The Center prepared a notice to the earlier striking employees and hand delivered this notice to those former striking employees. The notice indicated, among other things, that the Board of Directors had not made any decision regarding the reemployment of strikers offering to return to work, but that such a decision would be made shortly. Thereafter, the Center began to rehire certain striking employees on a ''as vacancy occurred'' basis.

Additional written information requests were submitted to the Center by the Union on 6 September and 2 October. The complaint alleges the failure of the Center to comply with all the Union's written information requests to be violations of Section 8(a)(5) and (1) of the Act.

C. *The Cause and Nature of the Strike*

A significant issue in this case is whether the strike initially was an economic or an unfair labor practice strike, and

[10] This restraining order expired on 15 July, but by a subsequent agreed order it was extended to 24 July.

[11] There were approximately 175 employees in the unit which the Union represented as of the date of the strike, 1 July. Approximately 130 employees went out on strike and as of the dates of the hearing of this case (in November 1985), approximately 30 of those striking employees had been rehired based on the Center's preferential hiring list. Approximately 44 employees did not go out on strike initially and some 7 employees returned after going out on strike. Walker and Thibodeaux were among the employees in the unit who did not go out on strike.

[12] The decertification petition, Case 23–RD–572, was ''administratively dismissed'' pending the outcome of the then existing unfair labor practice charges against the Center by the Union.

[13] I do not make this finding at this time and the petition will be discussed at length later herein. Durkay had actually learned about the decertification petition in a telephone conversation with Smith the prior evening. Durkay met with Smith, Rogers, and Larkins at approximately 7:30 a.m. They also discussed the attitude of most of the unit employees that were currently working at the Center regarding whether or not they favored or supported the Union.

[14] Notification of the strike termination and offer to return to work was actually made by letter from the Union dated 1 September. This letter was apparently hand delivered to the Center.

if economic initially, whether or not it was converted to an unfair labor practice strike by poststrike unlawful conduct by the Center. If the strike was economic only, the striking employees may be entitled to be returned to work only as vacancys occur. If at any point the strike was an unfair labor practice strike, the striking employees may be entitled to be returned to their jobs immediately after their unconditional offer to return, resulting in the immediate discharge of the replacements. The General Counsel and the Union argue that the strike, at its inception, was caused by the Center's refusal, during negotiations, to produce requested wage information regarding nonbargaining unit employees, in violation of Section 8(a)(5) and (1) of the Act. The General Counsel and the Union argue in the alternative that other poststrike alleged unfair labor practices by the Center prolonged the strike, thereby converting the strike from an economic to an unfair labor practice strike.

Hall either brought up or asked about the wages of nonunit employees during four negotiating sessions in June. The position of the Center, as expressed by attorney Durkay, was firmly that it was not relevant and none of the Union's business, although at the 18 June session Durkay indicated that no decision had been made regarding the wages of nonunit employees. At the 19 June session Durkay volunteered that there had been some cuts in hours among staff and supervisory employees, and at the 24 June session Hall learned that the wages of the nurses would not be cut. The Union held its strike vote at two separate meetings on 28 June and the subject came up only once, through a question from an employee in attendance at one of the meetings. It was far from the major topic of conversation. By far the biggest concern of the Union was the Center's continuing insistence on a wage cut to bring the unit's pay scale within the pay range of other similar units in the area. Durkay produced wage comparisons from other area nursing homes in support of the Center's position, at least one of which Hall and Durkay had actually negotiated, but Hall refused to consider them. The Union's steadfast position was that it would not and never accept a wage cut, and in my opinion, it was over this issue alone that the strike occurred. This fact is well supported by the record and evidence in the case, including the transcribed notes of the bargaining sessions, the Union's correspondence and published literature both before and after the strike, the testimony of Durkay and that of Sherril Avery, who was a member of the Union's negotiating team and a striking employee, and whose testimony regarding the subject was direct, firm and unequivocal. A multitude of subjects and issues were discussed during the bargaining sessions, and many issues had been settled. It is also noteworthy here that the Union's picket signs initially were economic and not unfair labor practice signs, and Hall himself testified that it was not until late July or early August that any changes were made regarding the signs.[15] Thus find and conclude that the strike in this case commenced as an economic strike.

I also find that the Center's so-called refusal in June to furnish wage information regarding nonunit employees was not unlawful and was not a violation of Section 8(a)(5) and (1) of the Act. In *New York Times Co.*, 270 NLRB 1267, 1273 (1984), the Board adopted the administrative law judge's decision summarizing the law as follows:

> An employer has a duty to provide on request information relevant to bargainable issues. The law in this area is clear and well settled. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). Where the requested information concerns wage rates, job descriptions, and other information relating to employees in the bargaining unit, the information is presumptively relevant to bargainable issues. *Fawcett Printing Corp.*, 210 NLRB 964 (1973); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965); *Timkin Roller Bearing Co.*, 138 NLRB 15 (1962), enfd. 325 F.2d 746, 750 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964). Where the request is for information concerning employees outside the bargaining unit, the union must show the requested information is relevant to bargainable issues. *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Rockwell-Standard Corp.*, 166 NLRB 124 (1967), enfd. 410 F. 2d 953 (6th Cir. 1969); *Curtiss-Wright Corp.*, supra. In determining whether the information requested by the Union is relevant, the general approach has been to apply a liberal discovery type standard to the issue of relevancy in evaluating each case on its facts. *Brazos Electric Power Cooperative*, 241 NLRB 10 (1979); *Acme Industrial Co.*, supra.

In considering whether or not financial information is relevant to a bargainable issue, the Board has held that there was no duty to produce such information where there is no claim of an inability to pay wage increases, but rather an unwillingness to pay such increases. *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). The Center's case regarding the wage cut rested on area standards, important to the Center notwithstanding its nonprofit status. However, to the Union, adamant in its position not to accept a wage cut, area standards had little or no significance in the matter. Nevertheless, the Center, on 24 June, offered to continue the expiring contract with its current wages if the Union did not strike and continued to bargain.[16] Although the Center's financial position was somewhat vague, the record in the case does not support a conclusion that the Center was pleading poverty or an inability to pay the contractual wage rates, but rather the record does reflect that the Center's position was an unwillingness to continue the wage rates. I am mindful of the dangers of accepting, carte blanche, an employer's mere verbal statements that its position is not one of an inability to pay, thereby possibly blocking a union from relevant information. However, in my opinion the record in this case, and the Center's nonprofit status, does not support even a suspicion that the Center was attempting to mask what was essentially a poverty plea. There was a legitimate reason for the Center's position regarding the wage cuts, wage information, and financial information, and in my opinion these positions were not taken in bad faith.

The complaint alleges that in the alternative, the strike was prolonged, and thus converted from an economic strike to an

[15] The record is curiously void of any specifics regarding the picket signs and their language. No signs or pictures were submitted into evidence and Hall's testimony was vague on the subject.

[16] This fact was conveyed to the employees by Hall at the strike-vote meetings on 28 June, but there was no discussion about the offer.

unfair labor practice strike, by certain unfair labor practices on the past of the Center after the strike commenced on 1 July, including the following: (1) the failure to comply with the Union's written information request presented to Durkay on 18 July; (2) the abrogation on 29 June of the grievance-arbitration procedure contained in the expiring contract;[17] (3) the solicitation of employees to sign a petition to decertify the Union by a supervisor on 10 July; and (4) the refusal of the Center to further bargain on 2 August.[18]

The last negotiating session where bargaining actually took place was 18 July. On that date attorney Durkay received a somewhat extensive written information request from Hall. It had been the practice of the parties to tender or exchange information requested at any given bargaining session at the next scheduled session. The 18 July request asked for detailed information regarding new hires in the unit on and after 1 July (the strike date), and detailed financial information about the Center, adding that the Union needed the information to ''evaluate the financial hardship claims of the facility.'' This also was the Union's first written request for wage information about nonunit employees.[19] I have earlier determined that the Center was not claiming an inability to pay the contractual wage rates, but did claim an unwillingness to continue such rates for other reasons. I find that the 18 July requested information was not relevant to any then existing bargainable issues, and thus I find that the Center's failure to respond to the request was not violative of the Act. I note also that after the 18 July session, there were also no further and actual bargaining sessions prior to the suspension of bargaining on 2 August.

On 29 June, Durkay sent a mailgram to Hall reciting, among other things, that the Center was ''no longer obligated to arbitrate grievances since the existence of a written collective-bargaining agreement a prerequisite to the arbitrator's jurisdiction,'' adding that the Center would agree to arbitrate all grievances presented to the Center prior to expiration of the contract. The complaint alleges that the mailgram and the Center's position regarding the arbitration grievance clause unlawfully abrogated the clause in the expiring contract in violation of Section 8(a)(5) and (1) of the Act. The Center argues that the statement in the mailgram was merely a position or opinion statement, and further urges, as Durkay so testified, that it was the understanding between the parties that the clause was coterminous with the no-strike clause of the contract, that is, that each clause was a quid pro quo for the other.

It is well settled that certain contractual provisions such as grievance-arbitration clauses survive the expiration of a contract unless the parties expressly or by clear implication negate such a presumption. *Nolde Bros.*, 430 U.S. 243 (1977); *Lithochrome Corp.*, 276 NLRB 1190, (1985); *American Sink Top & Cabinet Co.*, 242 NLRB 408 (1979); *Wayne's Olive Knoll Farms*, 223 NLRB 260 (1976). I find that it was the intention and understanding of the Union and the Center that the no-strike clause and the arbitration clause were linked together, and when one fell the other also fell. See *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974); *Goya Foods*, 238 NLRB 1465 (1978). I thus find that the Center did not violate the Act by abrogating the grievance-arbitration clause in the expiring contract.

The complaint alleges that on or about 10 July the Center, by and through Housekeeping Supervisor Matilda Brown, solicited employees to sign a petition to decertify the Union, in violation of Section 8(a)(1) of the Act. The only evidence in the record of this alleged violation is in the testimony of former employee Stacy Wolf, who worked for the Center for a short period in August as a security guard. Wolfe testified that he quit after about 30 days as a guard, but Chuck Robinson, who was in charge of security and safety at the Center, testified that Wolfe was discharged for dereliction of duty after 12 days on the job. I discredit Wolfe completely in this case. In testimony, especially during cross-examination, Wolfe vacillated and avoided direct answers. He was also impeached with a criminal conviction and no less than six other witnesses directly contradicted his testimony regarding Brown's actions. I thus find no such violation of Section 8(a)(1) of the Act.

D. *The Center's Suspension of Bargaining and Withdrawal of Recognition*

It is well established that an employer is free to withdraw recognition from an incumbent union either by showing that the union has actually lost majority support, or that the employer has a reasonably grounded doubt, based on objective considerations, about the union's continued majority status.

---

[17] The contract expired at midnight on Sunday, 30 June, and shortly thereafter the strike began (on 1 July). It was by mailgram dated Saturday, 29 June, that Durkay informed the Union of the Center's position regarding the grievance arbitration procedure in the contract. Although the mailgram was dated 29 June, it came on the weekend prior to the Monday strike and is properly treated in the complaint as a poststrike alleged unfair labor practice.

[18] On 2 August the Center suspended bargaining and withdrew its recognition of the Union as the collective-bargaining representative of its unit of service and maintenance employees. Later in this Decision, I find and conclude that such suspension and withdrawal was legally justified on the part of the Center.

The Complaint alleges three post-2 August unfair labor practices as also prolonging the strike. These alleged violations include the Union's written and extensive information requests on 2 and 6 August, and the refusal to allow Union Representative Hall to enter the Center's facility on 6 August. The later determination herein that the Center was legally justified in suspending bargaining and withdrawing recognition of the Union, in my opinion, also justified Hall's denial of entry on 6 August. Regarding the two information requests, I also find the Center's refusal to comply therewith justified based both on my earlier reasoning regarding the wage rate requests during bargaining in June, and also on the Center's lack of duty to furnish such information after its justifiable suspension of bargaining and withdrawal of recognition. For the latter reason I further find the refusal by the Center to, at least in part, comply with two additional written information requests on 6 September and 2 October, was also justified.

The complaint further alleges that the Center committed three more and separate unfair labor practices. First, that the Center wrongfully refused to reinstate employee Logie Rideaux on 5 September. Commencing in mid-May, Rideaux was on sick leave. In the meantime she participated in the strike. Although she did not testify in the case, her 5 September letter to the Center stating her readiness and desire to return to work was admitted into evidence. I find that the Center properly treated her as a striking employee, and she was placed on the Center's preferential hiring list of striking employees. Secondly the complaint alleges that the Center unlawfully refused to reinstate the striking employees immediately when the strike ended and they unconditionally offered to return to work. This issue has been partially resolved earlier herein when I determined that the strike was initially an economic strike. My disposition hereafter of the remaining poststrike unfair labor practice allegations will resolve the matter completely in favor of the Center.

Lastly, the complaint alleges that the Center unilaterally and unlawfully reduced the wages of the unit employees effective 7 October, without notification to or bargaining with the Union. My finding and conclusion later in this Decision that the Center was legally justified in suspending bargaining and withdrawing recognition of the Union also disposes of this final allegation favorably to the Center.

[19] The first charge in these consolidated cases (Case 23–CA–10109) was filed by Hall with the Board on 19 July, alleging violations of Sec. 8(a)(1), (3), and (5) of the Act.

American Mirror Co., 277 NLRB 1626 (1986); *Lithium Corp.*, 275 NLRB 1482 (1985); *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970). Such a good-faith doubt may be based on the overall situation and attitudes of the employees, employee behavior on the picket line, and spoken communications directly to the employer. *Terrell Machine Co.*, supra at 1480–1481. See also *Guerdon Industries*, 218 NLRB 658 (1975): *Bartenders Assn. of Pocatello*, 213 NLRB 651 (1974). Under recent Board law an employer's doubt of a union's continuing status is justified where approximately 20 percent of nonstriking employees made statements repudiating or rejecting the union, nonstrikers continued to the cross picket line despite sustained strike violence, and a substantial number of employees who crossed the picket line did not in fact support the union. *Stormor, Inc.*, 268 NLRB 860, 865 (1984). Thus, the presumption that the employer is obligated to bargain with an incumbent union may be rebutted by a clear and convincing showing of either an actual loss of majority status, or of objective factors sufficient to support a reasonable good-faith doubt of the union's continued majority status. *NLRB v. Tahoe Nugget*, 227 NLRB 357 (1976), enfd. 584 F.2d 293 (9th Cir. 1978); *Terrell Machine Co.*, supra. However, it is equally well settled that the filing of a decertification petition, standing alone, does not provide a reasonable ground to doubt the majority status of a union. *Dresser Industries*, 264 NLRB 1088 (1982). A sufficient reason for an employer to doubt a union's majority status may be found where a majority of employees in a unit sign a decertification petition, and thereby would have sanctioned the employer's withdrawal of recognition, providing the employer's action had been taken in a context free of unfair labor practices. In *Guerdon Industries*, supra, the employer's withdrawal of recognition was found to be unlawful where ''preceding violations are flagrant and egregious'' and ''of such a character to affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.''

In the case at hand, I conclude that the Center had clear and convincing evidence of an actual loss of majority status by the Union after learning of the employee's decertification petition, with at least 167 signatures out of 302 unit employees, as discussed below. Furthermore, even assuming that there had not been sufficient evidence of the Union's actual loss of majority status, I find that the Center also had a reasonably grounded good-faith doubt about the Union's continued majority status based on the following objective considerations: the Center knew that a majority of employees signed the decertification petition; approximately 84 employees made separate oral communications to supervisors against the Union; and the crossing of picket lines by many employees notwithstanding the picket line misconduct.

1. The Union's actual loss of majority status

In the instant case the parties are in dispute over the total number of employees in the bargaining unit during the strike. The Center's executive director, Emma Jo Smith, testified that the total number of unit employees was estimated on 2 August to be 310 to 312. The General Counsel, on the other hand, alleges that there were 329 bargaining unit employees, and accuses the company of manipulating the figures.[20] In any case, assuming argendo that the total number of unit employees was 329, as General Counsel contends, the record shows that the Center knew initially that between 167 to 172 unit employees signed the petition, still more than 50 percent of the 329 figure.[21]

On 1 August, employees Linda Walker and Margaret Thibodeaux filed the decertification petition with 142 signatures in Houston with Region 23 of the Board. Earlier that day Thibodeaux told Supervisor Larkins about the petition, showing Larkins 6 pages with the 142 signatures. Larkins photocopied part of the petition while Thidobeaux stepped out of the room with the other part. Larkins testified that she copied 4 sheets which were left in the room and which contained 93 signatures, and that Thibodeaux took 2 more sheets with her when she left the room. After Thibodeaux and Walker returned from Houston, they met with Larkins at their request, and again informed her that the first petition contained 142 names, and that a second petition of night-shift employees with 25 to 30 signatures had been lost. That evening Larkins told Personnel Director Lillian Rogers about the petition and Rogers reported it to Executive Director Smith, who told attorney Durkay about the decertification petition. On 2 August, the next morning, Larkins, Rogers, Smith, and Durkay discussed the petition, and determined by calculation that the Union no longer had a majority. Smith estimated the size of the bargaining unit to be 310 to 312 as of 2 August. Larkins had been told about 167 to 172 signatures, actually seen 142 signatures, and copied 93. Based on the 167 to 172 signatures Larkins had seen or had been told about, as of 2 August the Center had evidence of actual loss of majority status by the Union.

Subsequently, on 6 August employee Walker obtained 42 more signatures from a second petition of the night-shift employees.[22] This petition contained 11 duplicates previously on the first petition of 142 names. Thus, 32 more signatures were added to the original 142, resulting in 174 signers to decertify the Union. As of 6 August Larkins had seen or been told of 174 signatures, and had photocopied 125 signatures, out of 302 total unit employees. In his 6 August mailgram to the Union, Durkay announced the ''suspension'' of negotiations based on an alleged good-faith doubt of the Union's continued majority status. Durkay did not use the

[20] According to the General Counsel, 26 names were omitted from the Center's a list of employees considered to be on strike or leave of absence. Attorney Durkay conceded in testimony that the 310 figure does not include a number of ''discharged'' employees. Smith estimated that the number of discharged striking employees not listed to be from 15 to 20. Smith testified that most of these individuals were ''terminated,'' a term which she said includes discharge for picket line misconduct and voluntary resignation. However, Smith also testified that, at the time of the hearing, the 15 to 20 ''terminated'' employees had not yet received notice of termination. She stated that employees would be notified only when all the investigations of what we were going through were completed. Thus, the Center maintains that 15 to 20, and perhaps up to 26 employees are no longer in the unit, although the record reveals no such fact, other than Smith's testimony.

[21] The parties agree that the original unit was approximately 175 in number, that 44 employees never went on strike, and that approximately 120 ''new hires'' were hired during the strike. Using these figures, it follows that with the approximately 131 employees who went on strike, together with 44 employees who did not strike, the 7 who later withdrew from the strike and returned to work, and 120 ''new hires,'' the total number of unit employees was approximately 302.

[22] Larkins testified that Walker showed her the second night-shift petition, and that Larkins also photocopied the list. It was admitted into evidence.

phrase ''withdrawal of recognition,'' but under the circumstances of this case the suspension of bargaining resulted in a failure or refusal to recognize the Union, since the Act requires both parties to bargain in a timely fashion.

The foregoing circumstances persuade me that the Center had clear and convincing evidence of the actual loss of majority status by the Union.[23]

2. Other evidence of the Union's loss of majority status

The employer does not always bear the burden of proving that an actual numerical majority opposes the union, but in the alternative must demonstrate objective reasons for forming a reasonable good-faith doubt of union majority support. *Sofco, Inc.*, 268 NLRB 159 (1983). Such a good-faith doubt may be based on the overall situation and attitudes of the employees, employee behavior on the picket line, and spoken communications directly to the employer. *Terrell Machine*, supra. Furthermore, the Board has held that an employer's doubt of a union's continuing status is justified where approximately 20 percent of nonstriking employees made statements repudiating or rejecting the union, nonstrikers continued to the cross picket line despite sustained strike violence, and a substantial number of employees who crossed the picket line did not in fact support the union. *Stormor, Inc.*, 268 NLRB 860 (1984). See also *Sofco*, supra (good-faith doubt based on a plant manager's testimony that virtually all of the approximately 27 employees had approached him at one time or another and brought up the subject of ''do[ing] away with the Union''). In the instant case, the record reveals detailed testimony concerning verbal repudiations of the Union by employees. Supervisor Larkins testified that ''just about everybody'' who signed the first petition had made derogatory remarks about the Union. Larkins identified such employees and according to Larkins, employees told her that if the strikers cared about the patients, ''they would have stayed in and negotiated . . . rather than walk off.'' Larkins recalled repeatedly that individual employees said they ''didn't want any parts of the Union'' if it meant ''walking out on the geriatric patients,'' and ''they didn't need the Union to speak for them.'' she testified that the comments were made during hiring interviews and daily orientation meetings. Matilda Brown testified that employees often made antiunion comments after being harassed while crossing the picket line. Brown recalled 25 additional employees who made antiunion statements. Emma Jo Smith testified that even prior to learning about the decertification petition, she believed that the Union lacked majority status based on employee comments. Smith recalled 3 additional employees who made comments against the Union. It was stipulated that 3 other supervisors heard a total of 30 other employees who made similar critical remarks about the Union. Nursing Supervisor Mary Mason identified 23 employees, the director of the dietary department, Thelma Smith, identified 5 employees, and Nursing Supervisor Jenore Young recalled 2 additional employees. In sum, approximately 84 employees were recalled to have made antiunion remarks. There is no indication that any of the supervisors threatened employees or promised benefits in return for antiunion sentiments. See *Stormor, Inc.*, supra at 867.

Under Board law replacements are presumed to support an incumbent union in the same ratio as the employees they replaced. The presumption is rebuttable, but cannot be rebutted merely by showing that strike replacements crossed the union picket line. *Wilder Construction*, 276 NLRB 977 (1985); *I. T. Services*, 263 NLRB 1183 (1982); *Pennco, Inc.*, 250 NLRB 716 (1980), enfd. 684 F.2d 340 (6th Cir. 1982). In *Pennco* the Board held that ''the occurrence of some violence on the picket line is, at best, one factor weakening the presumption of majority status but not alone rebutting it.'' In *I. T. Services*, in finding that an employer had a good-faith doubt about the union's majority, the Board relied on several factors, including the Union's demand that the replacements be discharged, the statements by replacements that they did not want the Union to represent them, and the violence directed against them. In the instant case, strikers told new employees that they would be replaced, and many of the new employees made statements to supervisors that they did not want the Union to represent them. The hostility and threats directed against the new employees further justified the Center's good-faith doubt that the new employees did not want the Union's representation. During the 2 months of the strike, threats directed by pickets against the new employees was ubiquitous. Some obscene and violent threats were made by the strikers, and the Center's driveway was blocked. Margaret Thibodeaux testified that she was called names such as ''bitch'' and was told that her ''p—y would be hanging out to the ground.'' Supervisor Larkins testified that employee Augustino Rocio related that her car was painted and employee Tammy Johnson related that her tires were slashed and her car egged by the strikers. Security Guard Billy Riggs testified that ''disputes, arguments and intimidation'' occurred regularly on the picket line. According to Riggs. Cars were struck by picket signs, delivery vehicles were stopped and turned away, ambulances leaving the Center were followed, strikers sometimes carried pipes and sticks, and tacks were thrown on the driveway. Riggs further testified that the police had to be called regularly, and came by at night on a routine basis. On the picket line there was such hostility that some employees were picked up in a van at rendezvous points away from the Center, and driven passed the picket line. According to Maintenance Director Chuck Robertson, a pickup point had to be changed because strikers harassed employees waiting for the van. Nurses aide Jon Marie Batiste testified that on 2 July she was waiting at a pickup point when union representative Hall and a female union member approached her and using vulgar language told her that she was betraying her brothers and sisters. Robertson testified that he heard ''threats to kill'' on the picket line, that cars were hit, and that the situation got worse when union leaders were on the picket line. Robinson also indicated that one evening three sets of tires were slashed on the Center's property, and that an ambulance sustained a flat tire from tacks thrown on the driveway. According to Robertson, the driveway had to be checked for tacks every half hour. A majority

[23] It was counsel Robert Levy for the General Counsel, in this case, to whom Walker and Thibodeaux delivered the decertification petition, on 1 August. Counsel Levy also advised the two on the matter. Thus, prior to trial of this matter, counsel for the Center caused to be issued a subpoena duces tecum on Levy, which he received 15 November. The subpoena called for the production of the decertification petition case file (23–RD–572) on the first day of trial (20 November). At the trial, Levy filed a motion to quash the subpoena, with authorities, and for technical and legal reasons, I had to grant the motion. In any event, counsel for the General Counsel himself had an opportunity to disprove a majority of signatures, if indeed that the was the case, merely by producing the petition at trial.

of the unit employees were female, and Robertson further testified that at the beginning picketers were predominately female, but were later joined by a ''lot of males at night.'' Robertson added that employee Charlotte Semien told him that someone painted her car, threatened to kill her, and also threatened her baby. Employee Marvin Lewis testified that rocks and insults were thrown at him when he rode his bicycle to work. Housekeeping Supervisor Brown testified that employee Ulysses Sam complained his tires were slashed, and related that he filled a spray bottle with urine to spray at the strikers because he was ''tired of all that battering.'' On 5 July the Texas State District Court of Jefferson County entered a temporary restraining order against the Union enjoining certain picket line misconduct and limiting the number of pickets at any given time.

Inside the Center, there was also evidence of misconduct occurring before the strike. The week before the strike the Center found that the backs of some 10 geriatric chairs and 2 lounge chairs had been slashed. On 29 June, an unlit Molotov cocktail was found near the main natural gas intake on the outside of the Center. Supervisor Larkins testified that during the evening of 30 June, just before the strike, patients were given excessive amounts of laxatives, resulting in loose stools the following morning. Larkins also testified that drugs were mixed and a pharmacist was called in to help sort the medicines. The drugs that were mixed included Enderol, Isodil, and Lanoxin, which Larkins indicated could have caused contraindicated effects. Larkins added that patient's medicine cards were also found missing, and arm bands had been removed from the patients.[24]

Given the total circumstances of this case, including the Center's knowledge of 174 signers of the decertification petition, the reality of the ''new hires'' and nonstriking employees crossing hostile picket lines, flagrant threats, name calling and destruction to property occurring throughout the strike despite a court injunction, and testimony concerning the general running down of the Union by employees, I find that the Center also had a reasonable basis for doubting in good faith that the ''new hires'' and nonstriking employees continued to want union representation. Therefore I find and conclude that the Center's suspension of negotiations and withdrawal of recognition of the Union was justified, and was not a violation of the Act.

Regarding this sad and unfortunate case, in my opinion the Union perceived that it would take only a few days out on strike for the Center to withdraw its bargaining position regarding a wage decrease. Such was not the case, and on seeing that the Center was able to promptly replace the striking employees, the Union and the picketeers became increasingly hostile and the situation soon became virtually out of hand.

On the foregoing findings of fact and initial conclusions of law, and on the entire record, I make the following

CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 of the Act:

> All service and maintenance employees including nurses aides, medication aides, X-ray aides, medical records clerks, physical therapists, dietary assistants, cooks, housekeeping, and laundry employees, excluding all other employees, technical employees, including occupational technicians, occupational therapists, EKG/inhalation/X-ray technicians, occupational therapist aides, licensed vocational nurses, night and weekend shift maintenance employees who perform security duties, guards, watchmen, and supervisors are defined in the Act.[25]

4. That the Respondent Employer has not violated the Act as alleged in the amended consolidated complaint issued herein on 28 October 1985, and has not otherwise violated the Act.

[Recommended Order omitted from publication.]

[24] It is noteworthy that throughout all of the negotiating sessions after the strike began, picket line misconduct was never discussed.

[25] The description of the unit in the complaint contains the word ''technical'' prior to the words ''nursing aids.'' The word ''technical'' has been removed to conform to existing Board law.